

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY D. RAMEY

Claimant

VS.

DILLARDS

Respondent

AND

FIDELITY & GUARANTY INS. CO.

Insurance Carrier

Docket No. 1,050,089

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 15, 2010, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Charles W. Hess, of Wichita, Kansas, appeared for claimant. Elizabeth R. Dotson, of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 8, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant fell at work on March 2, 2009, and consequently incurred medical expense with Wesley Medical Center and the Sedgwick County Emergency Medical Service. In the June 15, 2010, Order, the ALJ ruled that claimant's accident arose out of her employment and, therefore, the ALJ ordered respondent to pay claimant's medical expenses.

Respondent contends claimant's accident occurred solely as the result of a personal condition in that she had an abnormal gait, was predisposed to falling, and she had previously fallen at work. In addition, respondent denies that claimant tripped over the cord of a vacuum but, if she did, respondent asserts such an accident would not arise out of

claimant's employment as vacuuming is an activity of day-to-day living. In short, respondent requests the Board to deny claimant's request for benefits.

Claimant contends her accident arose out of her employment in respondent's housekeeping department as she allegedly tripped over the electrical cord of the vacuum she was using to perform her assigned work. She maintains her injury did not occur as the result of an activity of day-to-day living.

The only issue before the Board on this appeal is whether claimant's March 2, 2009, accident arose out of her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes the preliminary hearing Order should be affirmed.

On March 2, 2009, claimant was employed by respondent, a department store, in its housekeeping department. Claimant's principal job duties were to clean bathrooms, windows, and vacuum. There is no dispute claimant fell and struck her head on a table at work on March 2, 2009. She was taken by ambulance to Wesley Medical Center, where she received medical treatment.

Claimant, who was 69 years old at the time of her accident and working part-time, testified she had plugged her vacuum into the electrical plug and tripped while walking back to the vacuum when her feet became tangled in the electrical cord. She testified as follows:

Q. [Claimant's attorney] Ms. Ramey, did anything unusual occur during the course of your work activities for Dillard's at Towne West on March 2, 2009?

A. [Claimant] I was going about my work and my feet—I plugged my sweeper in and going back to use the sweeper and my feet got tangled in the cords and caused me to fall.¹

At the time of the accident claimant understood her supervisor wanted her to work a bit faster, as someone was expected from respondent's corporate offices.

Sedgwick County EMS took claimant to the hospital. The records from EMS reflect that claimant reported she had tripped on the vacuum cord and fell.² Wesley Medical

¹ P.H. Trans. (June 8, 2010) at 10.

² *Id.*, Cl. Ex. 1 at 1.

Center admitted claimant for treatment. The hospital's records reflect that claimant "fell over a vacuum cleaner cord" at work.³

Following her release from the hospital, one of the doctors claimant saw was Dr. Douglas C. Woolley. The doctor's records from March 11, 2009, indicate claimant told him she fell at work after getting her feet tangled in the electric cord of a vacuum.⁴

One of the reasons respondent has denied claimant's request for workers compensation benefits is claimant's history of both having an abnormal gait and falling. When claimant was around 27 years old, she suffered a stroke that caused right-side weakness and some speech difficulties. In addition, during the last several months before her fall at work, claimant had been experiencing worsening right knee pain, and she admits favoring her right leg and falling. The history taken on March 18, 2009, by Dr. Robbie O'Brien Leighton, who saw claimant at Dr. Woolley's request states in part:

Patient is 69-year-old female who is here for difficulty with gait and frequent falls. This is my first encounter with this patient. . . . Patient states that right around age 27 or so, she did have stroke due to birth control pills which caused right-sided weakness, as well as some speech difficulties. She continued to do some therapy and work through it and reports overall she felt like she got almost back to normal, right side maybe slightly weaker than the left. She had done well until about a year ago when she started to have some falls at times. Patient seems to get off balance and goes down. She does not have any warning, and she denies any significant pain. Her husband feels that a lot of this trouble has been due to her worsening knee pain. She states she has been falling more in the last couple months since she has been off Celebrex. Patient reports she has been trying to take Aleve Arthritis for her knee pain, but it does not seem to help. She does admit to favoring her right knee when walking, especially at the end of the day as when she gets a lot of knee pain and it swells. She has had some injuries with falls and most recent one requiring stitches.⁵

Rhiannon McNulty, the sales manager who supervised claimant, testified that claimant was falling quite frequently at work before March 2, 2009, and, therefore, Ms. McNulty was not surprised that day when she learned of claimant's accident. Ms. McNulty estimates that claimant fell into a table that was 6 to 8 feet from the nearest mat that claimant was to vacuum. Moreover, Ms. McNulty testified that claimant stated before being taken away by EMS that "she basically said she had got tangled up in her feet and fallen."⁶

³ *Id.*, Cl. Ex. 2 at 1.

⁴ *Id.*, Cl. Ex. 3.

⁵ *Id.*, Resp. Ex. 1 at 1.

⁶ *Id.* at 54.

And when Ms. McNulty arrived on the scene within minutes of the fall, claimant's feet were not entangled in the vacuum cord.

After receiving medical treatment, claimant returned to work for respondent and performed her work duties until leaving work in early 2010 for knee surgery.⁷

Considering the above evidence, the ALJ determined claimant's accident was compensable under the Workers Compensation Act. The undersigned agrees. First, claimant's testimony is credible that she tripped over the electric cord to a vacuum that she used in her assigned work duties. Accordingly, the evidence establishes that claimant's fall was not due to a personal risk. Instead, the accident occurred while she was performing an activity that was part of, and incidental to, her employment. Consequently, the accident arose out of her employment with respondent. Second, the evidence does not establish that claimant's injury occurred as the result of an activity of daily living. Claimant was injured when she fell and hit a small table, which is far from a routine, ubiquitous, mundane activity that occurs away from the workplace. Moreover, K.S.A. 2009 Supp. 44-508(e) does not exclude "accidents" that are the result of such activity, rather it excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living.

In summary, the undersigned Board Member affirms the ALJ's finding that claimant sustained personal injury by accident that arose out of her employment with the respondent. Therefore, the preliminary hearing Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁹

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 15, 2010, is affirmed.

⁷ *Id.* at 60.

⁸ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

⁹ K.S.A. 2009 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of August, 2010.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Charles W. Hess, Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge